UNITED STATES OF AMERICA	)	
	)	**GOVERNMENT RESPONSE**
v.	)	**TO DEFENSE MOTION TO DISMISS**
	)	**BASED UPON UNREASONABLE**
Manning, Bradley E.	)	**MULTIPLICATION OF CHARGES**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**12 April 2012**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny the defense motion to dismiss and/or consolidate specifications based upon the allegation they constitute an unreasonable multiplication of charges. In the alternative, the United States requests the Court defer ruling on this motion until after the presentation of evidence or after ruling on proposed defense motions to dismiss specifications charged as violations of 18 U.S.C. §793(e) and 18 U.S.C. §1030(a)(1). The United States also requests the Court make findings establishing the elements of the 18 U.S.C. §641, 18 U.S.C. §793(e), and 18 U.S.C. §1030(a)(1) offenses.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. *Manual for Courts-Martial (MCM)*, United States, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

The United States stipulates to the facts as set forth in the defense motion, except for the following statement: "The case has been referred to a general court-martial by the convening authority with a special instruction that the case is not a capital referral." The above-captioned case was referred to a general court-martial without special instructions.

WITNESSES/EVIDENCE

The United States requests this Court consider the following enclosures:

1. Enclosure 1 to Appellate Exhibit XV, (pp. 25-27 of the Continuation Sheet to DD Form 457)
2. Charge Sheet
3. SD Card Forensic Report

ELEMENTS

The United States requests this Court adopt the following elements for the specifications charging misconduct in violation of 18 U.S.C. §641, 18 U.S.C. §793(e), 18 U.S.C. §1030(a)(1):

18 U.S.C. §641

(1) That the accused did [steal] [purloin] [knowingly convert] a [record] [thing of value];

(2) That the [record] [thing of value] belonged to the United States government;

(3) That the [record] [thing of value] was of a value of more than $1,000;

(4) That the taking by the accused was with the intent to deprive the United States government of the use or benefit of the property;

(5) That, at the time, 18 U.S.C. §641 was in existence;

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

18 U.S.C. §793(e)

(1) That the accused had possession of information relating to the national defense;

(2) That the possession was unauthorized;

(3) That the accused had reason to believe that such information could be used to [the injury of the United States] [the advantage of any foreign nation];

(4) That the accused willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it;

(5) That, at the time, 18 U.S.C. §793(e) was in existence;

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

18 U.S.C. §1030(a)(1)

(1) That the accused knowingly exceeded authorized access on a computer;

(2) That the accused obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of [national defense] [foreign relations];

(3) That the accused willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it;

(4) That the accused had reason to believe that such information could be used to [the injury of the United States] [the advantage of any foreign nation];

(5) That, at the time, 18 U.S.C. §1030(a)(1) was in existence;

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

LEGAL AUTHORITY AND ARGUMENT

RCM 307(c)(4) states that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The Court of Appeals for the Armed Forces has endorsed a four-part test for a trial court to determine whether the Government has unreasonably multiplied charges:

(1) Is each charge and specification aimed at distinctly separate criminal acts?

(2) Does the number of charges and specifications misrepresent or exaggerate the accused's criminality?

(3) Does the number of charges and specifications unreasonably increase the accused's punitive exposure?

(4) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012) (citing *United States v. Quiroz*, 55 M.J. 334, 338); *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004). In considering whether there is an unreasonable multiplication of charges, courts must balance the factors, "with no single factor necessarily governing the result." *Pauling*, 60 M.J. at 95. Ultimately, the doctrine is rooted in the traditional legal standard of "reasonableness" and is designed to address prosecutorial overreaching or abuse. *See Quiroz*, 55 M.J. at 338.

The defense argues that several specifications in this case violate the prohibition against unreasonable multiplication of charges. *See* Def. Mot. at 4. The United States disagrees. Analysis of the four factors articulated by the *Quiroz* court demonstrates that the specifications at

issue in this case do not constitute an unreasonable multiplication of charges for the reasons set forth below.

I. THE 18 U.S.C. §641 AND 18 U.S.C. §793(e) SPECIFICATIONS, TAKEN TOGETHER, DO NOT CONSTITUTE SUBSTANTIALLY ONE TRANSACTION.

A. The specifications are aimed at distinctly separate criminal acts.

The defense argues that each of the paired specifications (4 and 5; 6 and 7; 8 and 9) split one transaction into two specifications. *See* Def. Mot. at 5. Although the paired specifications relate to the same type of information – for example, Specifications 4 and 5 allege misconduct related to the "Combined Information Data Network Exchange Iraq database" – the paired specifications are aimed at distinctly separate criminal acts, as illustrated by comparing the elements of the offenses. *See Pauling*, 60 M.J. at 95 (referring to the court's multiplicity analysis in deciding that the specifications at issue were aimed at distinctly separate criminal acts). In order to prove the accused violated 18 U.S.C. §641 – Specifications 4, 6, and 8 – the United States must establish that the accused stole, purloined, or knowingly converted (hereinafter "stole" or "theft" in general context) United States Government property. *See* 18 U.S.C. §641. In order to prove the accused violated 18 U.S.C. §793(e) – Specifications 5, 7, and 9 – the United States must establish that the accused communicated, delivered, or transmitted national defense information to a person not entitled to receive it. *See* 18 U.S.C. §793(e). In short, the 18 U.S.C. §641 offenses are aimed at the theft of United States Government-owned databases, while the gravamen of the 18 U.S.C. §793(e) offenses is that the accused transmitted national defense information to unauthorized persons. Each specification alleging a violation of 18 U.S.C. §641 is directed at misconduct independent of its paired specification alleging a violation of 18 U.S.C. §793(e). The accused could have committed a theft of government property without a corresponding unauthorized transmission, and vice versa. As such, the paired specifications are aimed at distinctly separate criminal acts.

The defense also argues the paired specifications cannot logically be separated because the element of "unauthorized possession" under 18 U.S.C. §793(e) could not be met without first stealing or knowingly converting the database charged. *See* Def. Mot. at 6. This type of argument has been consistently rejected by appellate courts considering unreasonable multiplication of charges in the larceny and false claims context. In *United States v. Chatman*, 2003 WL 25945959 (A. Ct. Crim. App. June 13, 2003) (unpublished), the Army Court of Criminal Appeals rejected the appellant's claim that the specifications at issue were unreasonably multiplied because the proceeds of the false claims, supported in part by false receipts, were the subject of the larceny offense. *Chatman*, 2003 WL 25945959. The *Chatman* court held that "the Article 132, UCMJ, offenses have nothing to do with the gravamen of the larceny offense." *Id.*; *see also United States v. Brumfield*, 2005 WL 2704969 (N-M. Ct. Crim. App. Oct. 12, 2005) (unpublished) (rejecting claim of unreasonable multiplication of charges and stating that the "larceny and fraud offenses were aimed at distinctly separate criminal acts—the fraud offenses were complete as soon as the false claims were sent to DFAS, while the larceny was not complete until the money was actually received"). Like the false claims in *Chatman* and *Brumfield*, the records stolen under 18 U.S.C. §641 exist separate and apart from the misconduct relating to transmission of those records to unauthorized persons under 18 U.S.C. §793(e).

Because each pair of specifications constitutes a distinctly separate criminal act from its counterpart, the first factor under *Quiroz* must be resolved in favor of the United States.

B. The number of charges and specifications do not misrepresent or exaggerate the accused's criminality.

Analysis of the second factor also favors the United States. Between Specifications 4, 6, 8, and 12 of Charge II, the accused is charged with the theft of more than 700,000 records from various government databases. *See* Charge Sheet. The defense argues that the number of specifications misrepresents and exaggerates the accused's criminality. In fact, the specifications accurately represent the crimes the accused committed. As the court stated in *United States v. Foster*, 40 M.J. 140, 144 (C.M.A. 1994), "there is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s)." Charging the accused with the transmission of some small amount of national defense information would ignore the conduct that makes this case so unique in its criminality. Specifications 4, 6, and 8 capture the theft of an unprecedented amount of government information arising from various sources, regardless of whether the information was transmitted to another.

C. The number of charges and specifications do not unreasonably increase the accused's punitive exposure.

Additionally, Specifications 4, 6, and 8 do not unreasonably increase the accused's punitive exposure. The specifications are aimed at distinct misconduct and the punitive exposure is commensurate with the nature of the offenses. Further, the accused is charged with Giving Intelligence to the Enemy, a violation of Article 104. *See* Charge I and its Specification. Because this case was not referred capital, the Article 104 charge carries a maximum penalty of confinement for life without eligibility for parole. Even assuming, *arguendo*, that the Article 104 specification is dismissed, the remedy requested by the defense – dismissal of Specifications 4, 6, and 8 – would reduce the accused's punitive exposure from a maximum of 170 years confinement to a maximum of 140 years confinement. The third factor must also be resolved in favor of the United States because the accused's punitive exposure has not been unreasonably increased. The accused was charged with the very specific offenses he committed.

D. There is no evidence of prosecutorial overreaching or abuse in the drafting of charges.

Finally, there is no evidence, and the defense has pointed to nothing in this regard, of prosecutorial overreaching or abuse in the drafting of these specific specifications. The defense relies on Charge II itself as an example of prosecutorial overreaching, but as demonstrated above, Specifications 4, 6, and 8 are aimed at distinctly separate criminal acts from their counterparts in Specifications 5, 7, and 9. The specifications as a whole are designed to account for the egregious conduct of the accused while deployed in a combat zone. The defense believes the use of 18 U.S.C. §641 in the area of "information relating to the national defense" pushes the statute to the edge of its permissible application. *See* Def. Mot. at 7. This claim was rejected by the Fourth Circuit in *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991).

In *Fowler*, the accused was a Department of Defense civilian who retired and worked for the Boeing Aerospace Company ("Boeing"). Using his security clearance, he obtained classified documents from the Department of Defense and the National Security Council and delivered them to Boeing. Charged under 18 U.S.C. §641 with both conveying records and converting information to his own use, Fowler unsuccessfully moved to dismiss on the ground that 18 U.S.C. §641 does not punish the acquisition of classified information. *See Fowler*, 932 F.2d at 309. He urged the court to adopt the separate view expressed by Judge Winter in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). *Id.* As the *Fowler* court noted, Judge Winter, without concurrence of the other members of the court, wrote that Congress did not intend for 18 U.S.C. §641 to apply to the theft of government information. *Id.* The Fourth Circuit disagreed, citing *United States v. Morison*, 844 F.2d 1057, 1077 (4th Cir. 1988) (finding no error in the conviction under 18 U.S.C. §641 for the conversion of secret Navy documents and photographs); *United States v. Carpenter,* 484 U.S. 19, 25 (1987) (holding that intangible nature of newspaper's confidential business information did not make it any less "property" protected by mail and wire fraud statutes); *United States v. Jeter,* 775 F.2d 670, 680-82 (6th Cir. 1985); *United States v. Girard,* 601 F.2d 69, 70-71 (2nd Cir. 1979). The court concluded that "information is a species of property and a thing of value," and that "conversion and conveyance of governmental information can violate section 641." *Fowler,* 932 F.2d at 311. In short, the prosecution's use of 18 U.S.C. §641 in this case is a valid application of the statute and not evidence of prosecutorial overreaching or abuse as the defense claims.

II. SPECIFICATIONS 12 AND 13 OF CHARGE II, TAKEN TOGETHER, DO NOT CONSTITUTE SUBSTANTIALLY ONE TRANSACTION.

A. The specifications are aimed at distinctly separate criminal acts.

Addressing the four *Quiroz* factors at issue, Specifications 12 and 13 of Charge II do not constitute an unreasonable multiplication of charges. Like the paired 18 U.S.C. §641 and §793(e) offenses, Specifications 12 and 13 relate to information owned by the same organization—the Department of State. However, the specifications are aimed at distinctly separate criminal acts—as illustrated by comparing the elements of the offenses. In order to prove the accused violated 18 U.S.C. §641, the United States must establish that the accused stole or knowingly converted United States Government property. *See* 18 U.S.C. §641. In order to prove the accused violated 18 U.S.C. §1030(a)(1), the United States must establish that the accused willfully communicated, delivered, or transmitted to unauthorized persons "information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations." *See* 18 U.S.C. §1030(a)(1) . Again, the 18 U.S.C. §641 offense is aimed at the theft of particular United States Government-owned database, while an 18 U.S.C. §1030(a)(1) offense cannot be completed without the transmission of specific classified information to unauthorized persons. The first *Quiroz* factor must be resolved in favor of the United States. Specifications 12 and 13 are directed at distinctly separate criminal acts and stand completely on their own.

B. The number of charges and specifications do not misrepresent or exaggerate the accused's criminality.

Analysis of the third *Quiroz* factor also favors the United States. The defense argues that including Specification 12 misrepresents and exaggerates the accused's criminality, when in fact Specification 12 accurately captures the varied misconduct of the accused. As the court stated in *Foster*, "[T]here is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s)." *Foster*, 40 M.J. at 144. Charging the accused with exceeding authorized access on a computer and transmitting some small amount of classified information would ignore the conduct that makes this case so unique in its criminality. Specification 12 captures the theft or knowing conversion of an entire database worth of government information. It does not misrepresent or exaggerate the accused's misconduct, but attempts to account for it.

C. The number of charges and specifications do not unreasonably increase the accused's punitive exposure.

Additionally, the specifications at issue do not unreasonably increase the accused's punitive exposure. The specifications are aimed at distinct misconduct and the punitive exposure is commensurate with the nature of the offenses. Further, the accused is charged with Giving Intelligence to the Enemy, a violation of Article 104. *See* Charge I and its Specification. Because this case was not referred capital, the Article 104 charge carries a maximum penalty of confinement for life without eligibility for parole. Even assuming, *arguendo*, that the Article 104 specification is dismissed, the remedy requested by the defense – dismissal of Specification 12 – would only reduce the accused's punitive exposure from a maximum of 170 years confinement to a maximum of 160 years confinement. The fourth factor must also be resolved in favor of the United States because the accused's punitive exposure has not been unreasonably increased by including Specification 12. Specification 12 does increase the accused's punitive exposure, but only as a reflection of the accused's misconduct in this case.

D. There is no evidence of prosecutorial overreaching or abuse in the drafting of charges.

Finally, there is no evidence, and the defense has pointed to nothing in this regard, of prosecutorial overreaching or abuse in the drafting of these specific specifications. The defense relies on "the way in which Specifications 12 and 13 have been drafted." Def. Mot. at 9. As discussed above with respect to the other *Quiroz* factors, the 18 U.S.C. §641 offense and the 18 U.S.C. §1030(a)(1) offense are aimed at distinctly separate criminal acts, occurring at different times, and designed to account for the egregious conduct of the accused while deployed in a combat zone. Additionally, the defense further argues there is prosecutorial overreaching or abuse in this case because 18 U.S.C. §1030(a)(1) was enacted to "rectify the deficiencies of using 18 U.S.C. §641 to combat computer misuse." Def. Mot. at 10. The article relied upon by the defense does not say this, nor does the defense cite any legislative history to that effect. Professor Kerr's article is concerned with the deficiencies in using 18 U.S.C. §641 for computer crimes when it is difficult to define the *res*. Orin Kerr, *The Limits of Computer Conversion:* United States v. Collins, 9 *Harvard Journal of Law & Technology* 205, 211 (1996). In this case, the *res* is very clear—the wholesale theft of government information. Ironically, Professor Kerr discusses the *Collins* case to suggest 18 U.S.C. §641 is ill-suited to address computer conversion or misappropriation of intangible property, although the facts would pose similar problems for a

prosecution under 18 U.S.C. §1030(a)(1). The defendant in *Collins* was using his government computer to produce a newsletter for personal reasons, not obtaining classified information or obtaining other information from any department or agency of the United States. *See* 18 U.S.C. §1030(a)(1) and (a)(2).

III. SPECIFICATIONS 4, 5, 6, AND 7 OF CHARGE II ARE DIRECTED AT CONDUCT THAT OCCURRED ON SEPARATE DAYS AND DO NOT CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

The defense requests this Court dismiss and/or consolidate Specifications 4, 5, 6, and 7 of Charge II, leaving only one specification alleging a violation of 18 U.S.C. §793(e), based on the assertion that the specifications split the same transaction into multiple component parts. As discussed at length in Section I above, the conduct alleged by Specifications 4, 5, 6, and 7 of Charge II cannot be categorized as substantially one transaction. *See supra* Section I.

The defense argues that all four of the specifications are directed at conduct that occurred on the same day. Def. Mot. at 11. The evidence and a plain reading of the specifications contradict this assertion. *See* Charge Sheet. According to the forensic examination of the accused's Secure Digital (SD) card[1], the theft of the Combined Information Data Network Exchange Iraq database and the Combined Information Data Network Exchange Afghanistan database likely occurred on separate days, as evidenced by the "last written[2]" dates of the "afg_events.csv" file (8 January 2010) and the "irq_events.csv" file (5 January 2010). *See* Enclosure 3 at 9-10. The "afg_events.csv" file contains the records that are the subject of Specification 6. The "irq_events.csv" file contains the records that are the subject of Specification 4. Similarly, the forensic examination of the SD card indicates the transmission of the databases likely occurred sometime after 26 January 2010, because the accused was at his aunt's residence on leave and the compilation file ("yada.tar.bz2.nc"), containing the "afg_events.csv" and "irq_events.csv" sub-files, was created on 30 January 2010. *See* Enclosure 3 at 6-10. Thus, aside from the date ranges specified in the specifications themselves, the evidence clearly indicates that the misconduct charged in Specifications 4, 5, 6, and 7 of Charge II occurred on separate days. Each specification is directed at conduct independent of the conduct in the other specifications. The specifications do not constitute substantially one transaction as the defense has alleged.

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[1] An SD card is a memory card developed for use in portable devices. They have become a widespread means of storing several gigabytes of data in a small device.

[2] The "last written" date field in Encase indicates the date the digital file was last modified on a media device or hard drive. EnCase is a computer forensics product produced by Guidance Software used to analyze digital media by law enforcement agencies.

IV. SPECIFICATIONS 10 AND 11 OF CHARGE II ARE DIRECTED AT CONDUCT THAT OCCURRED ON SEPARATE DAYS AND DO NOT CONSTITUTE AN UNREASONABLE MULTIPLICATION OF CHARGES.

The defense asserts that Specifications 10 and 11 of Charge II are directed at a single disclosure of classified records and a video. Def. Mot. at 13. However, the defense acknowledges the difference between the two specifications—that as alleged, the disclosure of the classified records and the video occurred months apart. Furthermore, the "reality" the defense speaks of – that the classified records and the video were disclosed at the same time on the same day – is contradicted by the findings of the Article 32 investigating officer, who cited the Government's evidence that (1) an individual named Jason Katz was in possession of the video as early as 15 December 2009, and (2) WikiLeaks was in possession of the video as early as 8 January 2010. *See* Enclosure 1. Considering the time periods of the specifications themselves and the evidence presented at the Article 32, Specifications 10 and 11 of Charge II are different transactions aimed at distinctly separate criminal acts.

Additionally, the inclusion of Specification 11 of Charge II is not unreasonable and does not misrepresent or exaggerate the accused's criminality; rather, it accurately represents the misconduct of the accused by charging him with transmitting national defense information to the WikiLeaks organization as early as 1 November 2009. *See* Charge Sheet. Finally, the question of when the video was transmitted should be left to the trier of fact. If, as the defense asserts, the classified records in Specification 10 were transmitted to an unauthorized person on the same day as the video in Specification 11, the panel or military judge can find the accused not guilty of Specification 11.

CONCLUSION

For the reasons stated above, the United States requests the Court DENY the defense motion to dismiss and/or consolidate specifications as an unreasonable multiplication of charges. If the Court is inclined to consider any specifications to be unreasonably multiplied, the United States requests the Court defer ruling on a remedy until after the presentation of evidence or after ruling on defense motions to dismiss the specifications charged as violations of 18 U.S.C. §793(e) and 18 U.S.C. §1030(a)(1).

JODEAN MORROW
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 12 April 2012.

JODEAN MORROW
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Trial Counsel